City of Calimesa

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By Electronic Mail and U.S. Mail

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Re: Comments on Tentative Order No. R8-2009-0033 (NPDES Permit No. CAS618033)

On October 25, 2002, the Santa Ana Regional Water Quality Control Board ("Regional Board") issued a municipal storm water permit under the National Pollutant Discharge Elimination System ("NPDES") permit to the Riverside County Flood Control and Water Conservation District, the County of Riverside, and the 12 incorporated cities of Riverside County within the Santa Ana Region (Order No. R8-2002-0011, NPDES Permit No. CAS618033). The incorporated cities include: Beaumont, Calimesa, Canyon Lake, Corona, Hemet, Lake Elsinore, Moreno Valley, Murrieta, Norco, Perris, Riverside, and San Jacinto.

The Regional Board recently released Tentative Order No. R8-2009-0033 (NPDES Permit No. CAS618033). The Tentative Order, when adopted as a final draft, will constitute the new National Pollutant Discharge Elimination System Permit for the City of Calimesa ("City").

As discussed below, the City has serious concerns regarding the legality and viability of the provisions contained in this Tentative Order. If implemented, the City believes that the conditions of this Tentative Order could establish the Regional Board as a "super municipality" responsible for setting zoning policy and requirements throughout Riverside County. The prescriptive nature of this policy will ensure that any resident or business challenging the conditions set forth in this Tentative Order would not only sue the municipality charged with implementing these procedures, but would also have to bring suit against the Regional Board itself to obtain the requested relief. The City does not believe this was the intent of the Regional Board.

Rather than prescribing a strict set of requirements, the Regional Board should work with the Permittees to develop a range of potential programs that each Permittee could implement according to each Permittee's own individual needs and circumstances.

On behalf of the City of Calimesa, we hereby submit the following initial comments on the Tentative Order:

1. THE TENTATIVE ORDER GOES BEYOND FEDERAL LAW AND CONSTITUTES UNFUNDED STATE MANDATES

Many of the additional programs the Regional Board seeks to impose require a higher level of service of existing programs that are not required or mandated under the Clean Water Act or any federal regulations thereunder. The imposition of unfunded programs and mandates in the Tentative Order is inconsistent with the provisions of the California Constitution, specifically Article XIII B, Section 6, which requires a state agency mandating a new program or a higher level of service to provide a "subvention" of funds to reimburse local governments for the costs of the program or increased level of service.

Article XIII B, Section 6 of the California Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a "subvention of funds to reimburse that local government for the costs of the program or increased level of service...." State agencies are not free to shift state costs to local agencies without providing funding merely because those costs were imposed upon the state by the federal government. If the state freely chooses to impose additional costs upon a local agency as a means of implementing its policy, then those costs should be reimbursed by the state agency. *See Hayes v. Commission on State Mandates,* 11 Cal. App. 4th 1564, 1593-94 (1992). If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. *See Lucia Mar Unified School District v. Honig*, 44 Cal. 3d 830, 833-34 (1988).

The Tentative Order will require a substantial capital investment, which individual cities will have to fund, despite the fact that no funding mechanism, nor any assistance, financial or otherwise, is provided to the Permittees. To our knowledge, the Regional Board has made no provision for funding the projects it has proposed in the Tentative Order.

Moreover, the Tentative Order explicitly provides that the Tentative Order does not constitute an unfunded mandate for four reasons. Because the City disagrees with all four stated reasons, we ask that the Regional Board remove from the Order all requirements that go beyond federal law, or in the alternative, agree that all such mandates will be funded by the State. To the extent the Tentative Order imposes additional programs on the Permittees without providing additional funds, they are unfunded mandates.

A. The Tentative Order Imposes Requirements that Go Beyond Federal Law

To the extent the Tentative Order imposes requirements that go beyond what is required by federal law, the Regional Board is required to consider and address among other things the constitutional prohibition on unfunded state mandates. In fact, there are many specific obligations in the Tentative Order that are not federally mandated.

For example, paragraph 10 of subsection A of Section IV (Local Implementation Plan) on page 50 of the Tentative Order provides that "[e]ach Permittee shall include the ordinances, design standards, procedures and other tools it uses to implement green infrastructure/low impact development principles for public and private development projects." This clearly goes beyond federal law, as nothing in the Clean Water Act requires Permittees to adopt green infrastructure/low impact ordinances. Therefore, such a requirement is a state unfunded mandate.

Yet another example of the Regional Board's overreaching beyond federal law is found in subsections I and J on page 67 of the Tentative Order. Subsection I requires that each Permittee submit a certification statement in its Annual Report, signed by its legal counsel, that the Permittee has obtained all necessary legal authority in accordance with 40 CFR 122.26(d)(2)(i)(A-F). The Clean Water Act does not require the certification statement mandated by the Regional Board. 40 CFR 122.26(d)(2)(i) only requires "[a] demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts...." Arguably, the City can demonstrate its legal authority by submitting copies of ordinances, resolution or contracts certified by the City Clerk. The Clean Water Act does not require Permittees to submit a certification statement.

Subsection J on page 67 of the Tentative Order requires that Permittees annually review the adequacy of their ordinances and implementation and enforcement response procedures and submit findings of these reviews, along with supporting details and recommended corrective actions and schedules as part of the Annual Report. This requirement also goes beyond the Clean Water Act. Again, the City can simply submit copies of applicable ordinances, certified by the City Clerk.

Furthermore, the Tentative Order goes beyond federal law, as the Tentative Order is at least twice as long, and in some cases, three times as long as other MS4 Permits developed by other Regional Boards in the State of California, such as the Lahonten Regional Board and the Central Valley Regional Board. This means that either some Regional Boards are failing to impose federally mandated requirements pursuant to the Clean Water Act, or the more likely explanation is that the Regional Board is imposing requirements that go beyond federal law.

B. The Fact that Industrial Dischargers are More Strictly Regulated than Municipal Dischargers is Irrelevant to the Unfunded Mandate Issue.

The Tentative Order asserts that the Order does not constitute an unfunded mandate because the Order regulates discharges of waste from municipal sources more leniently than the could regulate discharges from non-governmental dischargers. *See* paragraph b of subsection 10 on page 13 of Tentative Order). The City fails to see how this statutory distinction between the regulation of municipal and industrial dischargers affects whether the Order imposes requirements on Copermittees that go beyond federal law and, therefore, must be funded by the State.

C. Copermittees Do Not Necessarily Have the Requisite Authority to Levy Fees to Pay For Compliance With the Order.

The Tentative Order also alleges that the Order does not constitute an unfunded mandate because Copermittees have the authority to levy service fees to pay for compliance with the Order. Pursuant to Government Code Section 17556(d), if a local agency can levy service fees to pay for a State mandate, the State is not required to provide funding for the mandate.

Copermittees do not, however, necessarily have the authority to levy service fees to pay for the State mandate. The Tentative Order presumes, but makes no specific findings, that Copermittees have the authority to levy such service fees. In fact, to the extent such service fees are "property-related," Copermittees can only levy them once approved by the affected property owners or electorate. *See* California Constitution, Article XIIID, Section 6(c); *Howard Jarvis Taxpayers Ass'n, v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). The *City of Salinas* case dealt precisely with this issue. The City of Salinas established a fee to recover costs related to compliance with its MS4 Permit. The fee was based largely on the amount of impervious area on a developed parcel. The Court held that this fee was property-related and, thus, subject to voter-approval requirements. *Salinas*, 98 Cal. App. 4th at 1356. Only if the fee was a use-based charge, directly based on use of city services (such as the metered use of water), could the fee avoid the voter-approval requirements of Article XIIID. The City of Salinas's method to allocate the fee based on the amount of impervious area so as to assure that the fee charged would be proportional to the burden being placed on the City's storm drain system was not sufficiently direct to qualify as a use-based fee exempt from the requirements of Article XIIID. 98 Cal. App. 4th at 1355.

Because storm water running off of real property and into the MS4 is not capable of precise measurement, it would be impossible to meet the direct usage requirements of *City of Salinas*. Accordingly, without voter approval, Copermittees do not have the authority to levy service fees to pay for compliance with the Order.

D. Copermittees Do Not Have a Real Choice.

The fourth reason provided in the Tentative Order for why the Order does not constitute an unfunded mandate is that Copermittees requested permit coverage under the Order. Thus, according to the Tentative Order, Copermittees have not been mandated to do anything. Tentative Order implies that, in lieu of coverage under the Order, Copermittees could cease all discharges from their MS4s.

The City respectfully disagrees that these suggested alternatives provide Copermittees with any real choice. To cease discharging from their MS4s is impossible and, thus, not a real choice. Accordingly, it is disingenuous for Regional Board staff to suggest that Copermittees have voluntarily chosen coverage under the Order and that the Order cannot be considered a State mandate.

Rather than mandate programs, the Regional Board should work collaboratively with the Permittees to develop programs acceptable to and capable of implementation by the Permittees. To the extent that these programs will require additional funds, the Regional Board should assist the Permittees in securing such funds. Clean water is a goal that all public agencies share. The responsibilities and challenges involved with achieving this goal is something that all agencies should take part in.

2. THE TENTATIVE ORDER IMPROPERLY INTRUDES UPON THE CITY'S LAND USE AUTHORITY IN VIOLATION OF THE TENTH AMENDMENT

To the extent that this Tentative Order relies on federal authority under the Clean Water Act to impose land use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of the U.S. Constitution. *See* paragraph 10 on page 50 of the Tentative Order. Furthermore, to the extent the Tentative Order **requires** a Municipal Permittee to modify its city ordinances in a specific manner, it also violates the Tenth Amendment.

According to the Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article XI, section 7 of the Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." The United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. *See Berman v. Parke,* 348 U.S. 26, 32-33 (1954). Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

By requiring Permittees to adopt green infrastructure/low impact development ordinances (Paragraph 10 of page 50 of Tentative Order), the Regional Board is taking over the land use powers of the municipality Permittees in violation of the Tenth Amendment. From the City's perspective, under the guise of federal law, the Regional Board is attempting to dictate the precise manner in which cities must exercise their police powers. The City does not believe that such a requirement would pass muster under the Tenth Amendment.

Rather than adopting programs which dictate the precise method of compliance, the Regional Board should collaborate with the City and other Permittees to develop a range of model programs that each municipality could then modify and adopt according to their own individual circumstances.

3. THRESHOLD FOR VIOLATING THE MEP STANDARD IS UNCLEAR

The Tentative Order provides that "[t]he discharge of Urban Runoff from the MS4 to Receiving Waters containing pollutants, including trash and debris, that have not been reduced consistent with the MEP standard is prohibited."

This prohibition begs the question of how the City is to know whether it is violating the MEP standard, when the MEP standard by definition stands for "Maximum Extent Practicable." It is unclear how the Permittees are to determine when it is violating this requirement.

4. REQUIREMENTS FOR "FETDs" IN THE TENTATIVE ORDER ARE NOT SUPPORTED BY LAW AND PROVIDE DISINCENTIVES TO IMPROVING WATER QUALITY.

The City opposes the FETD requirements provided in subsection 4 on page 54 of the Tentative Order. These requirements are not supported by law and will impose unnecessary burdens on Copermittees for attempting to improve water quality. The Regional Board does not have authority to impose the proposed FETD requirements.

Federal law requires that Copermittees "effectively prohibit non-stormwater discharges into the [MS4]." Clean Water Act Section 402(p)(3)(B)(ii), 33 U.S.C. Section 1342(p)(3)(B)(ii). Subsection 4 on page 54 of the Tentative Order goes beyond this federal requirement. First, it would impose obligations on Copermittees for discharges not *into* the MS4, but *from* a FETD. Nothing in the Clean Water Act or federal regulations provides the Regional Board with such authority. Second, subsection 4 on page 54 of the Tentative Order would make Copermittees absolutely responsible for discharges of non-storm water from FETDs that cause or contribute to conditions of erosion. Under federal law, Copermittees only are responsible for *effectively prohibiting* discharges of non-storm water. The Tentative Order provides no authority for imposing requirements that go beyond the federal requirement.

In addition, to the extent FETDs are not part of the MS4, the Regional Board has no authority under the Clean Water Act to regulate them in an MS4 permit. Under the Clean Water Act, the Regional Board only can regulate discharges from the MS4 and discharges of non-storm water into the MS4. As currently implemented, and as acknowledged in the Tentative Order, FETDs remove pollutants that have already been discharged into receiving waters *from MS4s*. If this is the case, a FETD cannot be *part of* the MS4. A discharge from a FETD, therefore, is neither a discharge of pollutants *from an MS4* (which must be controlled to the maximum extent practicable) nor as noted above is it a discharge of non-storm water *into an MS4* (which discharges must be effectively prohibited).

Finally, to the extent FETDs do not add any pollutants to waters of the U.S. that are not already present in the influent to the FETDs, there is no basis for regulating FETDs under federal NPDES permits. Under both federal and state law, the Regional Board only can regulate discharges of pollutants, meaning the addition of pollutants to receiving waters. *See, e.g.,* Clean Water Act Section 502(12)(A), 33 U.S.C. Section 1362(12)(A). Where the pollutants being discharged from a FETD simply are being passed through, without the addition of pollutants to the receiving water, there is no basis for regulating the discharge.

Accordingly, because the proposed FETD requirements clearly exceed the Regional Board's authority under federal and state law and because Regional Board staff have provided no other specific legal authority for the requirements, the City requests that the FETD requirements be deleted.

5. THE TENTATIVE ORDER IMPOSES REQUIREMENTS THAT ARE PROHIBITIVELY EXPENSIVE AND BURDENSOME

Section XI (starting at page 70) of the Tentative Order requires Permittees to maintain a municipal inspection program. The Tentative Order requires, as part of that inspection program, a municipal inspection inventory that is maintained in an electronic database available to the public. The Tentative Order also requires that the electronic database include "inspection dates, inspectors present, adequacy of site plans, any observed violations, corrective actions required, any enforcement actions and follow-up actions taken by the Permittee, date compliance was achieved, prior history of violations, and any other relevant information."

This requirement absolutely goes beyond federal law. It is one thing for the Regional Board to require Permittees to keep and maintain the requested information; it is, however, an entirely different thing to require that such detailed information be maintained in electronic database available to the public. The development and maintenance of such an electronic database is prohibitively expensive and burdensome for the City.

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The process of regulating stormwater discharges and reducing pollutants present in the waters of the United States is extremely complex. For this reason, any regulations purporting to address this problem must be developed only after extensive collaboration with the regulated community. Adopting a cooperative approach will ensure that all parties retain ownership of this difficult issue.

As public agencies, all parties involved in the NPDES permitting process have the obligation to carry out their duties in a responsible, realistic, and reasoned manner. Requirements that tether public agencies to impractical positions are counterproductive and violate our sacred charge as representatives of the people. The City is committed to working with the State and the Regional Board in order to achieve our mutual goals and looks forward to engaging in a constructive dialogue with Regional Board staff on these issues.

We look forward to your response to these comments as well as other comments submitted by the County of Riverside and other cities and agencies.

Sincerely,

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cc: Mr. Michael J. Adackapara, Division Chief
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